LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
[illegible]
S. [illegible], Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 795 :

[redacted]

NICKLOS DRILLING COMPANY, ET AL.,
Petitioner,

UNIT CRANE AND SHOVEL CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

W. FORD REESE
937 National Bank of Commerce Bldg.
New Orleans, Louisiana 70112
Counsel for Petitioner, Nicklos Drilling Company

Of Counsel:
Adams and Reese
New Orleans, Louisiana

INDEX

	Page
JURISDICTION	2
OPINIONS BELOW	2
QUESTIONS PRESENTED	2
STATUTE INVOLVED	3
STATEMENT OF THE CASE	3
SPECIFICATION OF ERRORS TO BE URGED	5
ARGUMENT	6
CONCLUSION	15
PROOF OF SERVICE	16
APPENDIX A (District Court Memorandum Opinion and Judgment)	17
APPENDIX B (Appellate Court Decision and Denial of Rehearing)	41
APPENDIX C (28 U.S.C.A. §1333)	44
APPENDIX D (28 U.S.C.A. §2106)	45

INDEX OF AUTHORITIES

Cases:	
Cipriano v. City of Houma, 23 L. Ed 2d 647 (1969)	8
Goett v. Union Carbide Corp., 361 U.S. 340 (1960)	2
General Talking Pictures Corp. v. Western Electric Co., Inc., 304 U.S. 175 (1937)	2
Great Northern R. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932)	8
Huson v. Chevron Oil Co., Supreme Court No. 661, October Term, 1970	7, 9

AUTHORITIES Continued

	Page
Linkletter v. Walker, 381 U.S. 618 (1965)	8
Mason City R. Co. v. Boynton, Iowa, 158 F. 589 (1907)	12
Monolith Portland Midwest Co. v. Kaiser Alum. & Chem. Co., 407 F.2d 288 (9th Cir. 1969)	11
Niagara Fire Ins. Co. v. Brian & Hewgley, 195 F.2d 154 (6th Cir. 1952)	11
Pure Oil Co. v. Snipes, 293 F.2d 60 (5th Cir. 1961)	6
Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352 (1969)	2, 3, 4, 5, 6, 7, 8, 9, 12, 15
Soileau v. Nicklos Drilling Co., 302 F. Supp. 119, (W. D. La. 1969)	9, 14
The Tungus v. Skovgaard, 358 U.S. 588 (1959)	2
Watts, Watts & Co. v. Union Austriaca Di Navigazione, 248 U.S. 9 (1918)	12
Statutes:	
28 U.S.C. § 1254(1)	2
28 U.S.C. § 2100	3, 11
43 U.S.C. § 1331 et seq.	3, 6

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

NO.

NETTIE LEE FONTENOT, ET AL.,
Petitioner,

versus

NICKLOS DRILLING COMPANY, ET AL.,
Petitioner,

UNIT CRANE AND SHOVEL CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Nicklos Drilling Company respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Fifth Circuit in No. 28,331 rendered on July 21, 1970, which reversed an earlier Judgment by the district court of the United States for the Western District of Louisiana, Opelousas Division, in Civil Action No. 12,084, in which the said district court granted judgment in favor of complainant, Nettie Lee Fontenot, and cross-claimant,

Nicklos Drilling Company, against Unit Crane and Shovel Corporation and remanded the case for a new trial.

JURISDICTION

Jurisdiction to review this case upon writ of certiorari is authorized and created by U.S.C.A. Title 28, § 1254(1). See: *General Talking Pictures Corporation v. Western Electric Co., Inc.*, 304 U.S. 175 (1937); *The Tungus v. Skorgaard*, 358 U.S. 588 (1959); and *Goett v. Union Carbide Corp.*, 361 U.S. 340 (1960).

The opinion of the Court of Appeals for the Fifth Circuit was rendered July 21, 1970. A petition for rehearing was filed by petitioner Fontenot on July 30, 1970, and by co-petitioner and cross-claimant Nicklos Drilling Company on Aug. 4, 1970, and denied on Aug. 12, 1970, without a further opinion. A motion was made to that court for a stay of mandate pending the filing of this petition for certiorari and granted on Sept. 9, 1970.

OPINIONS BELOW

The district court's memorandum opinion as well as the judgment is printed in appendix "A"; and, the opinion and denial of rehearing by the Court of Appeals for the Fifth Circuit are printed in appendix "B".

QUESTIONS PRESENTED

1. Whether the decision of this Honorable Supreme Court in *Rodrigue v. Aetna Casualty and Surety Company*, 395 U.S. 352 (1969) is to have retroactive effect.

2. Assuming the answer to the foregoing Question No. 1 is in the affirmative, is the proper remedy for the Court of Appeals to reverse and remand for a new trial rather than to reverse and render where the district court has rendered a written opinion stating that whether maritime law under Death on the High Seas Act is applicable or Louisiana law is applicable the decision would be the same except with regard to damages; and, with regard to damages, where the district court in its written opinion has already stated what those damages would be under either alternative.

STATUTE INVOLVED

The applicable provisions of the Outer Continental Shelf Lands Act, U.S.C.A. Title 43, § 1331 *et seq.*, are set forth in the appendix. Those provisions are involved specifically with reference to the recent Supreme Court decision of *Rodrigue v. Aetna Casualty and Surety Company*, 395 U.S. 352 (1969). The applicable provision of the Judiciary and Judicial Procedure Act, U.S.C.A. Title 28 §2106 is also set forth in the appendix.

STATEMENT OF THE CASE

The original complainant is the widow of a deceased worker, Lanson Soileau, and mother of his six minor children. Soileau was killed when a crane manufactured by defendant, Unit Crane and Shovel Corporation, failed and brought him to his death on January 17, 1966. On the day of this unfortunate occurrence, the deceased was employed by Nicklos Drilling Company, owner of the crane and of a drilling rig which was

placed atop a fixed and immobile artificial island platform off the Louisiana coast, which platform was owned by Union Oil Company.

Suit was filed on June 6, 1966. Ultimately, defendants included Union Oil Company, Nicklos Drilling Company, and Unit Crane and Shovel Corporation. Nicklos Drilling Company made a cross claim against Unit Crane and Shovel Corporation for the property damage it sustained as a result of the loss of the crane.

The case was tried for five full days between December 2-6, 1968. Judgment was rendered in favor of the original complainant and in favor of cross-claimant against Unit Crane and Shovel Corporation. This judgment was signed on May 1, 1969.

All of the above took place prior to the rendering, by this Honorable Supreme Court, of the decision in RODRIGUE V. AETNA CASUALTY AND SURETY COMPANY, 395 U.S. 352 (June 9, 1969).

The district court rendered lengthy but clear and exhaustive reasons for his judgment. Realizing, as all counsel involved herein did, that the Supreme Court had the *Rodrigue* case under consideration, the lower court judge, in giving reasons for his judgment, stated specifically that whether the case was to be decided as a maritime matter (Death on the High Seas) under the then existing authority or under Louisiana law, the result would be the same except for damages. With regard to damages he specifically found what the damages would be in the former case as well as in the latter, but since maritime law was the prevailing

jurisprudence, he only *rendered* a judgment for damages under that law.

Unit Crane and Shovel Corporation appealed the district court decision.

The United States Court of Appeals for the Fifth Circuit from a panel consisting of circuit Judges Coleman, Goldberg and Morgan, rendered a 28 line *per curiam* opinion which reversed and remanded the case for a new trial. Citing the *Rodrigue* case as authority, the court stated that Louisiana law should have been applied to the claim asserted in the case.

Petitions for rehearing were timely filed, both by original complainant as well as cross-complainant, but were denied, without opinion, on Aug. 12, 1970.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the Fifth Circuit erred and misdirected itself, as follows:

1. In holding that the *Rodrigue v. Aetna Casualty and Surety Company* case had *retroactive* effect by deciding that Louisiana law should have been applied to the case when at the time of the trial the then prevailing law held that maritime doctrines should be applicable.

2. In reversing and remanding for a new trial rather than reversing and rendering a decision when the district court had set out precise reasons under both Death on the High Seas Act and Louisiana law and

when an injustice to the parties could be avoided by obviating the necessity of the delays of waiting for a new trial, as well as the attendant expenses of retrying a case once fully tried for a complete week.

3. In holding that complainant, Fontenot, and cross-claimant, Unit Crane and Shovel Corporation, were similarly situated when, in any event, it could have affirmed the judgment in favor of Nicklos Drilling Company.

ARGUMENT

1. *The appellate court erred in holding that Rodrigue v. Aetna Casualty and Surety Company had retroactive effect by deciding that Louisiana law should have been applied to the case when at the time of the trial the then prevailing law held that maritime doctrines should be applicable.*

Prior to this Court's decision of *Rodrigue v. Aetna Casualty and Surety Company*, 395 U.S. 352 (1969) courts in coastal areas had uniformly applied maritime law to cases involving accidents which occurred on "artificial islands" constructed on the Outer Continental Shelf. This was primarily based on an interpretation of the Outer Continental Shelf Lands Act, 43 USCA § 1331, et seq.; *Pure Oil Co. v. Snipes*, 293 F.2d 60 (5th Cir. 1961). Your Honors, however, decided in *Rodrigue* that this was erroneous and that the Outer Continental Shelf Lands Act intended that the law of the adjacent State be applied as "surrogate" federal law. This was the first case ever decided by this tri-

bunal relative to an interpretation of that part of the Outer Continental Shelf Lands Act.

Unfortunately, the decision in *Rodrigue v. Aetna Casualty and Surety Co. supra* does not set forth its own limitations or suggest guidelines to numerous practical problems. As a result, some of these unanswered questions are now clogging the courts' docket with motions and appeals. As an example of this petitioner herein refers the Court to *Huson v. Chevron Oil Co.*, No. 28,448, United States Court of Appeals for the Fifth Circuit (Decision rendered July 14, 1970).

In *Huson* the district court, cognizant of *Rodrigue*, determined that the Louisiana prescriptive period (statute of limitations) applied and dismissed petitioner's complaint as having been untimely filed. The appellate court reversed and applied the maritime doctrine of laches. It neatly, *but expressly*, sidestepped the issue as to whether *Rodrigue* should be applied retroactively, which issue, had it been met squarely, would have given guidance to many lower courts now mired in a quagmire of doubt anent the impact of *Rodrigue*. A petition for a writ of certiorari in that case is presently pending before the Honorable Supreme Court. See *Chevron Oil Co. v: Huson*, Supreme Court of the United States, No. 661, October Term, 1970 (filed September 8, 1970).

In the instant case one panel of the appellate court renders an opinion stating that the lower court should have applied Louisiana law even though it was correct in trying the case under then extant principles. With-

out giving any reasons the appellate court makes the impact of *Rodrigue* retroactive.

In short, it can be seen that both the instant case and the *Huson* case, as well as numerous others, could be settled and a surer course could be chartered by lower courts with more elucidation on the meaning and implications of your Honors decision in *Rodrigue v. Aetna Casualty and Surety Company*.

But, further, it is submitted that the appellate court committed error in deciding the instant case in the way it did. Although it has been pointed out that suit was filed, the case tried, and judgment rendered before the *Rodrigue* case was decided, nonetheless the appellate court in its terse opinion states:

> "It appears, therefore, that Louisiana law as provided in the Outer Continental Shelf Lands Act rather than the law provided in the Death on the High Seas Act should have been applied to the claims asserted in this case."

This Court has considered on numerous occasions and particularly in the relatively recent past the question of retroactive versus prospective application of its decisions. The prevailing test seems to be whether or not it would work a substantial hardship to apply the new interpretation of old law retroactively to litigants who, in good faith, have relied on existing interpretations. *Cipriano v. City of Houma*, 23 L.Ed.2d 647 (1969); *Great Northern R Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932); *Linkletter v. Walker*, 381 U.S. 618 (1965). In this case there can be no doubt that it would

be a great hardship to retry this case which was prepared by all counsel and tried for a full week. This is true particularly in view of the fact that one petitioner is a widow with six children (and in view of the decision of the lower court discussed *infra*).

It is also not only ironical but germane to this petition for a writ of certiorari that one panel of the Fifth Circuit should apply *Rodrigue* retroactively when another panel of the same court just one week before avoided the issue, but, in so doing, stated that if faced with that issue, it would probably be persuaded on an equitable basis to apply *Rodrigue only prospectively*. See *Huson v. Chevron Oil Co.*, *supra*.

2. *The appellate court erred in reversing and remanding for a new trial rather than reversing and rendering a decision when the district court had set out precise reasons for judgment against Unit Crane under both maritime and Louisiana law and when an injustice to the parties could be avoided by obviating the necessity of the delays of waiting for a new trial, as well as the attendant expenses of retrying a case once fully tried.*

The district court rendered written reasons for its judgment which took 10 pages in the volume of the Federal Supplement in which it was reported. See *Soileau v. Nicklos Drilling Company*, 302 F. Supp. 119 (W.D. La. 1969). In its two-paragraph opinion, the appellate court stated that it appeared that the case was tried under the wrong law, and that Louisiana law

should have been applied. It did not refer to, directly or indirectly, the exhaustive opinion of the lower court which found liability against Unit Crane and Shovel Corporation under *both* maritime concepts and Louisiana law. The district judge, as well as counsel, had anticipated that perhaps *Rodrigue* might make a change in the law and in order to avoid exactly what the Fifth Circuit has done, it specifically considered the case under the "old" law and the "new" law. After finding liability under the then existing and applicable law, the district court went on to state:

> "However, in the view which we take of this case, it would make no difference in the outcome if we apply the Death on the High Seas Act or Article 2315 of the Louisiana Civil Code, except in the measure of damages recoverable for Mr. Soileau's death. In addition to pecuniary losses, these DOHSA plaintiffs would be entitled to damages for loss of love and affection of their deceased husband and father." *Id.* at 124.

Thus, the court considered liability under both concepts of substantive law. Regarding damages, he made a specific finding of pecuniary losses and also made a finding of damages for loss of love and affection. *Id.* at 127-28. However, he only rendered judgment for the pecuniary losses because under the then prevailing law, that is all plaintiff was entitled to.

The damages of Nicklos Drilling Company, your co-petitioner herein, were stipulated and would not have

been different in any case since there were only property damages involved.

Notwithstanding the district court's attempt to avoid bringing this case through the courts again, the appellate court reversed and remanded for a new trial, without any directions whatsoever. It failed to use the power to reverse and render which it could and should have used. 28 U.S.C. § 2106. Hopefully, this Honorable Court will deign to use the powers granted in that statute or provide some reason for not doing so.

Section 2106 of Title 28 provides that the Supreme Court or "any other court of appellate jurisdiction" may affirm, modify, etc. any judgment brought before it for review and "may remand the cause and direct the entry of such appropriate judgment ... as may be just under the circumstances." Thus, there is no doubt that an appellate court rather than reversing and remanding can reverse and modify the lower court's judgment. *Niagara Fire Ins. Co. v. Brian and Hewgley*, 195 F.2d 154 (6th Cir. 1952). With regard to damages particularly, they possess the power to reduce the amount of statutory awards of reasonable attorneys' fees, *Monolith Portland Midwest Co. v. Kaiser Aluminum and Chemical Corp.*, 407 F.2d 288 (9th Cir. 1969); they may increase inadequate damages awarded by a court sitting without a jury. [*which is exactly what is involved herein assuming Rodrigue has retroactive application*], *Taylor v. U.S.*, 396 F.2d 837 (6th Cir. 1958); and, they have the power to completely modify a district court judgment where all questions of fact have been tried and determined without error, but the judgment incorporates provisions which are unauthorized,

all obviating the necessity for remand. *Mason City R. Co. v. Boynton, Iowa*, 158 F. 589 (1907). Not only does the appellate court have power to make the minor changes suggested by the cases cited above, but it also can take into consideration changes of law as well as of fact. *Watts, Watts & Co. v. Union Austriaca Di Navigazione*, 248 U.S. 9 (1918).

A recent Fifth Circuit decision of *Simpson v. U. S.*, 322 F.2d 688 (5th Cir. 1963), sets forth the guidelines of that circuit regarding modification of judgments: The Court in *Simpson* stated:

> "Where there are firm guidelines establishing the basic elements of the award and it can be computed with some degree of certainty as easily by the appellate court as by the trial judge, it would be mere wasted motion to remand the cause for new findings."

The district judge in the instant case fully realized the possibility that *Rodrigue* would force an appellate court to reverse the judgment entered and made every effort to set forth the basic elements of his award for damages, apparently so that any new award (as made necessary by *Rodrigue*) would be computed easily and with certainty by the appellate court without the necessity of remand. Specifically, the district judge stated that the only difference between recovery under the Death on the High Seas Act and Louisiana law would be the measure of damages stating that the award for pecuniary losses of $109,960.84 would be supplemented if Louisiana law applied by damages for "grief, anguish, and loss of love, companionship and guidance."

Id. at 128. He exactly computed these at $60,000.00 for Mrs. Soileau, funeral expenses of $3,788.65, and $10,000.00 for each of the six children. *Id.* at 128. And of course, there would be no change in the damages of Nicklos Drilling Company, since that claim only involved property loss.

It is true that The Trial Court carefully followed this rule, (the rule admittedly existing at the trial and permitted recovery under the terms of the Death on the High Seas Act.) But it is also true that the trial court specifically and in writing found liability of Unit Crane and Shovel Corporation under Louisiana law. Thus, even if this case were remanded for a new trial, he would certainly do the same thing. The lower court stated:

> "Unit, therefore, would be liable to all plaintiffs for their damages under the maritime law, Death on the High Seas Act, *or Article 2315 of the Louisiana Civil Code*, the sole difference being in the measure of damages for the wrongful death of Mr. Soileau to be recovered by his survivors, under the facts of this case." 302 F. Supp. 119, 127. (Emphasis added.)

Again, it is submitted that it is manifestly unjust to reverse and remand for a new trial, forcing the claiming parties who have tried this case under the proper law as it existed on the day of the death of the deceased and on the day of the trial. Moreover, remanding for a "new" trial brings up many unanswered questions, which questions themselves are worthy of a hearing. Is the court indicating that there should be a

full trial, thus giving the losing defendant (who admittedly incorporated a defective part in its crane) a chance to get out of liability when that defendant has already been found guilty under *both* maritime law *and* Louisiana law? Could it be merely a question of damages which are incorrect (notwithstanding the lower court's precise calculations)? Is it to be a new trial as to *both* claimants, Miss Fontenot and also Nicklos Drilling Company? (Nicklos Drilling Company had a property damage claim only and this was stipulated to be in the amount of $40,104.00.)

It is respectfully submitted that there is no apparent justified reason for reversing *and remanding* this case for a *new trial*. This court is empowered to reverse and render and, heretofore, has done so in cases such as this where it would be manifestly unfair to make the parties go to trial all over again, when the issues have been so well litigated in the lower court and the district judge went out of his way to avoid exactly what is happening now in this case. His well-reasoned opinion should be reconsidered. See *Soileau v. Nicklos Drilling Company*, *supra*.

3. *The Court erred in holding that complainant, Fontenot, and cross-claimant, Unit Crane and Shovel Corporation, were similarly situated when, in any event, it could have affirmed the judgment in favor of Nicklos Drilling Company.*

This petition is being filed by cross-claimant Nicklos Drilling Company. The original complainant, Fontenot, has her own petition. The two petitions do not have

identical stakes at interest. This is another and important feature of the case which the Fifth Circuit in its pithy opinion did not consider. Even if *Rodrigue* is to be applied retroactively, the only difference it makes in this case is in the amount of damages to be awarded original complainant, Fontenot, as the result of the death of her husband. Nicklos Drilling Company only sued for property damages the amount of which was stipulated.

There is no apparent reason that the judgment of Nicklos Drilling Company had to be reversed even assuming there was a valid reason that the judgment in favor of Fontenot had to be reversed with regard to quantum.

CONCLUSION

This petition for writ of certiorari filed by Nicklos Drilling Company, as well as the petition of Fontenot in the instant case and the petition of Chevron Oil Company in the *Huson* case, all result from a lack of complete understanding of the *Rodrigue v. Aetna Casualty and Surety Company* case. No doubt there are many other such cases in the district and appellate court level awaiting further amplification of *Rodrigue* by your Honors. It is respectfully submitted that a writ of certiorari should be granted to accomplish that end and also that the decision of the United States Court of Appeals for the Fifth Circuit, No. 28,331, should be reversed and the judgment of the district court of the United States, Western District of Louisiana, Opelousas Division, Civil Action No. 12,064, should be reinstated; alternatively, that the decision of the Court

of Appeals for the Fifth Circuit should be reversed and a judgment rendered in accordance with the reasons given by the district court.

New Orleans, Louisiana, October ____ ,1970.

W. Ford Reese, Esq.
Counsel for Petitioner,
Nicklos Drilling Company

MESSRS. ADAMS AND REESE
Of Counsel

PROOF OF SERVICE

In furtherance of the Rules, I have served three copies of the above and foregoing petition for writ of certiorari upon all parties, by prepaid mail addressed to their counsel, this ____ day of October, 1970.

W. Ford Reese

APPENDIX "A"

Nettie Lee Fontenot SOILEAU, Ind. and as Natural Tutrix of minors Donald Ray, James Randall, Romona Cynthia Marie, Patrick and Charles Soileau

versus

NICKLOS DRILLING COMPANY et al.

Civ. A. No. 12064.
United States District Court
W. D. Louisiana, Opelousas Division
March 28, 1969.

PUTNAM, DISTRICT JUDGE

MEMORANDUM OPINION

On January 17, 1966, Lanson Soileau, husband and father of the petitioners, was killed when a crane manufactured by Unit Crane and Shovel Company (Unit), mounted on a pedestal on a fixed oil well drilling platform, toppled from its base and fell into the Gulf of Mexico. The platform was located on the outer continental shelf, off the Louisiana coast.

Plaintiffs sued Union Oil Company of California, (Union) owner and operator of the platform, Nicklos Drilling Company (Nicklos), Boehck Engineering Company, Inc., distributor and Nicklos' immediate vendor, and Unit. The suit against Nicklos (Under the Jones

Act) was dismissed when it was determined that Soileau was employed by that defendant, and that plaintiffs' original belief that the structure in question was a submersible drilling barge was erroneous. Boehck Engineering Company, Inc. was also dismissed by agreement of the parties.

Trial proceeded under the Death on The High Seas Act, 46 U.S.C.A. § 761 et seq., and Article 2315 of the Louisiana Civil Code, which is the wrongful death statute of this State.

Nicklos cross-claimed in maritime tort against Unit for the value of the crane and certain drilling supplies, lost when the crane fell into the Gulf. Union cross-claimed against Nicklos under an indemnity provision of its drilling contract, as well as against defendant Unit. Nicklos assumed Union's defense, and the litigation finally resolved itself into a suit between Mrs. Soileau and her six minor children and Nicklos, on the one hand, and Unit on the other.

Prior to the trial the Soileau claims under Article 2315 of the Louisiana Civil Code were dismissed, following the decision in *Dore v. The Link Belt Company*, 391 F. 2d 671 (5 Cir. 1968), and *Rodrigue v. Aetna Casualty & Surety Co.*, 395 F. 2d 216 (5 Cir. 1968). Since writs were issued by the Supreme Court in these cases, _____ U. S. _____, 89 S. Ct. 295, 21 L. Ed. 2d 268 (1968), the court reinstated these demands to avoid the necessity of an additional trial in the event they are overruled. We have, accordingly, made separate determinations of plaintiffs' damages for loss

of love and affection under Article 2315, in addition to pecuniary losses under the Death on the High Seas Act.

The evidence preponderates to the effect that at the time of the accident Soileau was unloading heavy crates of drilling supplies from the M/V Florida, a supply vessel alongside the platform. He was using a No. 1525-U crane manufactured by Unit, with a sixty-three-foot boom. It was put into service in April, 1964. During its working life on the platform it was regularly maintained by the crane operators and other Nicklos personnel. It was manufactured and sold for use in the offshore oil industry. There is no evidence in the record showing that it was not satisfactory for this work, except for the accident in question.

Soileau had gone on duty only fifteen or twenty minutes before the tragedy occurred. He was an experienced crane operator, familiar with this crane, having been so employed for approximately fifteen months. The cargo he attempted to lift was a rack of one-inch "spaghetti" pipe, of a stipulated weight of 20591 pounds.

The deckhand (Valentine) who attached the load on the supply boat to the hook did not have a clear recollection of events that morning. He testified that the boom angle was "between one and two o'clock" when the crane fell. Another deckhand (Ortego) said the boom was "almost straight up". The lift was smooth, and the pipe was approximately 70 feet in the air at the time. The Florida had pulled away and was forty feet off the platform. The crane hit the water ap-

proximately twenty feet from the boat. Another witness, K. C. Simmons, was on the platform handling a tag line attached to the rack of pipe to prevent it from twisting. He does not know the angle of the boom or the position of the boat when the lift was made, but he stated he was leaning over the platform railing from four to six feet from the crane pedestal, and the load was directly below him when the failure occurred.

Earlier that morning the Florida had been tied up to the platform port side to, using the port stern line. During the operation this line parted. The line fouled the port screw and thereafter the skipper maneuvered the ship into position by using the starboard engine and circling the platform. The deceased lowered the block and cable to a point some 30 to 35 feet above the water. When the vessel was in position the boom cable was brought down, the load secured, then taken up. The captain's testimony is not clear as to the angle of the crane boom when the accident occurred. He stated that the port side of the vessel was from 6 to 8 feet off the legs of the platform, and that the pipe rack was to be lifted from the port side of the after deck. By proceeding forward on the starboard engine the bow of the vessel would have a tendency to swing to port, into the platform. By backing down to check her and hold her in position, even using the rudders, there would be a tendency to swing the bow to the starboard away from the platform, and the stern in. Reference to the photograph of the platform marked "Unit 2" shows that the crane pedestal actually extends over the water and out from the edge of the platform several feet.

From the foregoing and other evidence in the record, we conclude that the lift was made from a distance or not more than fifteen feet from the center line of rotation of the crane, with a boom angle of approximately 82-1/2°. (See Exhibit P-9) The rated lifting capacity of this crane with the load fifteen feet from the center line of rotation is 31,450 pounds, with a safety factor of 15%. Even at twenty feet with a boom angle of approximately 74°, the rated capacity is 20,050 pounds, and with the 15% safety factor it is 23,057 pounds. The testimony of the deckhand Ortego, who saw the lift made after the hook was secured to the rack of pipe, is the most reliable and convinces us that the boom was, in fact, "almost straight up" when the accident occurred. According to exhibit P-9 when the boom is straight up (at 85°, or 5° off vertical) the hook will hang ten feet from the centerline of rotation. With the skin of the ship six to eight feet from the platform (actually beneath the crane pedestal) considering that she had a 32-foot beam and the cargo being lifted was on her inboard side, the load distance could not have been greatly in excess of fifteen feet. The weight of the load then, was well within the crane's rated capacity.

Placing the cart before the horse, we must reject Unit's contention that its machine was subjected to a gross overload at time of failure, and with it the affirmative defense of contributory negligence.

The crane was recovered from the bottom of the Gulf. It was apparent that the right rear hook roller link had broken, causing it to topple over into the water. There was considerable expert testimony as to why this

link failed, which we will not discuss in detail. It was manufactured of grade 87-C steel, cast by Crucible Steel Corporation to specifications of Unit, and according to literature from this foundry it should have had a minimum yield point of 91,000 pounds p.s.i., and a tensile strength of 120,000 p.s.i. It was critical part of the crane assembly. Due to an imperfect casting and poor welding at the foundry, the strength of the link in question was greatly reduced. As a result of the foundry welding processes, cracks in the cast link were not fully repaired and actually aggravated the imperfect condition of the link. The evidence further preponderates to the effect that Crucible Steel used an acetylene or gas welding process, made an incomplete weld, and did not properly heat treat the metal after welding, resulting in increased brittleness and less ductility. Stresses in the metal were concentrated at those points where the cracks were not fully repaired. The fracture was a brittle fracture, propagating almost instantaneously. As we observed at the conclusion of the trial, the court is unable to pinpoint any one circumstance or combination of circumstances, that existed on the day in question that immediately caused the failure, but fail it did, because of these defects. There is not, in our opinion, sufficient evidence from which we can reasonably conclude that the design of the link of the hook roller assembly was defective or improper. The imperfect casting was the sole defect.

In this connection, the advertising brochure of Crucible Steel, Exhibit P-22, is replete with representations of the high quality of its steel castings, and the radio-

graphy, X-ray, and magnetic particle inspection techniques exercised by it to detect defects and maintain quality control. It is emphasized that: "Attention is specifically given to high-quality castings which require special heat treatment and redesign work." These hook roller link assemblies were critical parts in the Unit Crane for which they were intended. The question of Unit's negligence is admittedly a close one. Unit exercised practically no quality control over these castings, relying upon Crucible Steel in this respect. There is no showing in the record that Unit's reliance upon its supplier was contrary to good industrial practices, or that it had any reason to believe that the castings were not as represented. We accordingly conclude that Unit was not negligent, although its reliance upon Crucible was clearly misplaced.

There is practically no dispute that: (1) the hook roller assemblies on the crane were placed in the machine at the factory and reached the purchaser without substantial change; (2) that the normal operating life of the hook roller link is in excess of two years in the absence of defects; (3) that the link in question, as well as the entire crane, was properly maintained by Nicklos; (4) that the hook roller link is a crucial operating component of the No. 1525-U crane, upon which the safe use of the machine depends.

Due to the defects in this particular link as outlined above, the molecular structure of the steel was adversely affected and its strength reduced. In this condition, the crane was potentially dangerous to the life and property of those who could foreseeably be

expected to use it. The danger to the operator under all of the circumstances of this case was so great as to constitute an unreasonable risk. It was a constant, invisible and virtually undetectable threat to those in its vicinity when put to its intended use.

This fixed platform, attached to the seabed of the Gulf of Mexico, was not a vessel in navigation. By the express provisions of the Outer Continental Shelf Lands Act it is an artificial island. 43 U.S.C.A. § 1333(a) (1). Torts occurring on such fixed structures and artificial islands have uniformly been regarded as maritime, and federal maritime law has been applied to litigation resulting therefrom. *Pure Oil Co. v. Snipes*, 293 F. 2d 60 (5 Cir. 1961); *Ocean Drilling & Exploration Co. v. Berry Bros. Oilfield Service*, 377 F. 2d 511 (5th Cir. 1967); *Movible Offshore Co. v. Ousley*, 346 F. 2d 870 (5 Cir. 1965); *Loffland Brothers Company v. Roberts*, 386 F. 2d 540 (5 Cir. 1967), cert. den. 389 U.S. 1040 (1968), are but a few of the legion of cases decided on this basis. In Louisiana at least one appellate court in a well-reasoned opinion has reached the conclusion that the courts of this state have no jurisdiction over such structures on the outer continental shelf. *Gravois v. Travelers Indemn. Co.*, 173 So. 2d 550 (La. App. 1965).

It came as no surprise, therefore, when it was held that the Death on the High Seas Act, 46 U.S.C.A. § 761 et seq., was the exclusive remedy afforded survivors of an offshore workman killed in an industrial accident occurring on such a platform. *Dore v. The Link Belt Company*, supra, was the landmark case in the Fifth Circuit on this point. The decision is consistent with

prior jurisprudence dealing with maritime injuries short of death; it insures the uniformity of maritime law and a certain degree of stability in the contractual relationships of those engaged in the offshore oil industry and other enterprises in the shelf of the controlled development of the natural resources found there.

Considerable speculation now exists as to the conclusions reached in *Dore*, as a result of the writs issued by the Supreme Court which we have mentioned above. The Outer Continental Shelf Lands Act, 42 U.S.C.A. § 1333(a) (2) provides that "To the extent that they are applicable and not inconsistent with — (the Act) — or with other federal laws — the civil and criminal laws of each adjacent State as of August 7, 1953 are declared to be the law of the United States — artificial islands and fixed structures erected thereon —", if such structures would be included in the area of the State if its boundaries were extended seaward to the outer margin of the shelf. Whether or not the Death on the High Seas Act is the exclusive remedy for Mr. Soileau's survivors, or whether the statutory provision above quoted makes Article 2315 of the Louisiana Civil Code (which is the Louisiana wrongful death statute) applicable, will be decided by the Supreme Court in its review of *Dore* and *Rodrigue*, supra.

However, in the view which we take of this case it would make no difference in the outcome if we apply the Death on the High Seas Act or Article 2315 of the Louisiana Civil Code, except in the measure of damages recoverable for Mr. Soileau's death. In addition

to pecuniary losses, these DOHSA plaintiffs would be entitled to damages for loss of love and affection of their deceased husband and father. As we shall see, Louisiana law holds a manufacturer to strict liability in tort for damages caused by his defective products, as does the common law.

It is now widely recognized that one who manufactures and sells a chattel tainted with a defect of such nature as to render the product reasonably dangerous to the person or property of those who might reasonably be expected to consume or use it, is liable *in tort* for breach of his special responsibility to the public to see to it that the product is fit for its intended use, regardless of the exercise of all possible care in the manufacturing process. The historical development of this theory of strict liability in the common law has been the subject of much legal writing. The rule that has evolved is, we think, fairly stated in Section 402A, Restatement of the Law, Torts Second, as follows:

> "Special Liability of Seller of Product for Physical Harm to User or Consumer
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> > (a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

The rapid evolution of the rule is traced with exhaustive reference in the cases of *Lartigue v. R. J. Reynolds Tobacco Company*, 317 F. 2d 19 (5 Cir. 1963); *Ford Motor Co. v. Mathis*, 322 F. 2d 267, (5 Cir. 1963); and *Putnam v. Erie City Mfg. Co., et al.* 338 F. 2d 911 (5 Cir. 1964).

Lartigue deals with Louisiana concepts under the civil code and is especially appropriate here. The case dealt with the injurious effects of cigarettes manufactured by the defendant upon the health of plaintiff's husband, who died of lung cancer. It was decided prior to the revision of the Restatement of Torts Second, supra, and the discussion is confined to Louisiana cases dealing with food and drugs, or articles intended for intimate bodily use by the consuming public, to which the rule of strict liability was then confined. Article 2315 of the Louisiana Civil Code provides that "Every act whatever of man that causes damage to another

obliges him by whose *fault* it happened to repair it." Judge Wisdom, with customary thoroughness, expands upon the civilian concept of fault as used in this article of the code. He states the Louisiana rule as follows:

> "In Louisiana under Articles 2315 and 2316, as in other states, a manufacturer of an injurious or defective product is liable to a consumer, when he fails to use due care in manufacturing a product. *In the case of decayed foodstuffs or food products containing deleterious substances, the manufacturer is held to strict liability, without regard to negligence.* Such liability is not inconsistent with the civilian requirement "fault".
>
> Delictual responsibility without dolus (wilful harming) or culpa (negligent harming) is explainable in terms of presumption of fault. Stone, Tort Doctrine in Louisiana, the Concept of Fault, 27 Tul. L. Rev. 1, 14, 19 (1952).
>
> *Delicts (torts) do not have to depend on negligence. In the Civil Code, as in the common law, there are a number of instances of strict delictual liability when the law conclusively presumes fault notwithstanding the fact that the party liable did not will the damage and was not personally negligent."*
> (317 F. 2d 19, at 30, 31. Emphasis supplied.)

The court cited *Doyle v. Fuerst & Kramer, Ltd.*, 129 La. 838, 56 So. 906, 40 L.R.A. N.S. 480 (1911); *Mayerhe-*

fer v. Louisiana Coca-Cola Bottling Co. 219 La. 320, 52 So. 2d 866 (1951); and *LeBlanc v. Louisiana Coca Cola Bottling Co.*, 221 La. 919, 60 So. 2d 873 (1952), among other food cases, as demonstrating the present tendency of the Louisiana Supreme Court to view the question as one of tort liability rather than contractual warranty as some of the earlier decisions indicated.

In *Samaha v. Southern Rambler Sales, Inc.* 146 So. 2d 29 (La. App. 4 Cir. 1962), not a food products case, the court cited and relied upon the earlier decision of *Gordon v. Bates-Crumley Chevrolet Company, et al*, 158 So. 233 (La. App. Cir. 1935), and held the manufacturer of a defective automobile liable in tort to the purchaser, while dismissing the dealer-retailer. These cases turn upon the theory of imputed negligence, based upon constructive knowledge of the manufacturer of the defects in the machine fabricated and marketed by him, rather than the seller's warranty against redhibitory vices in the thing sold giving rise to liability as provided in Articles 2522, 2531 and 2545 of the Louisiana Civil Code. The recovery allowed in *Samaha* against the manufacturer of the automobile in question is clearly in tort, with fault being presumed. The retailer was released from liability under the articles on redhibition, which apply only to the relationship of vendor and vendee flowing from the sale itself.

In the more recent cases of *Meche v. Farmers Drier and Storage Company*, 193 So. 2d 807 (La. App. 3rd Cir. 1967) writs refused March 10, 1967, and *Arnold v. United States Tire and Rubber Company*, 203 So. 2d 764 (La. App. 3rd Cir. 1968), the rule is stated thus:

> "A manufacturer or seller of a product which involves a risk of injury to the user is liable to any person, whether the purchaser or a third person, who without fault on his part sustains an injury caused by a defect in the design or manufacture of the article if the injury might have been reasonably anticipated." (193 So. 2d at 811).

In *Meche*, the court dealt with an allegedly defective elevator manufactured by one of the defendants; in *Arnold*, with a fire hose that ruptured under pressure. And, in another food case, *McCauley v. Manda Brothers Provisions Co., Inc.*, 202 So. 2d 492 (La. App. 1st. Cir. 1968) the same rule of strict liability in tort was applied against the manufacturer of the tainted sandwich (not against the seller), while the doctrine was further extended to the manufacturer of sight glasses on a fluid level gauge used on a high pressure separator unit to test an oil well in Lafourche Parish in *Penn. v. Inferno Manufacturing Corporation*, 199 So. 2d 210, (La. App. 1st. Cir. 1967). It is important to note that in all of these cases there was no privity of contract between the plaintiff and the defendant manufacturer. There can be no contention that the court based its holding on a theory of contractual warranty, or that privity of contract is an essential element of plaintiff's claim. The remedy is purely delictual, based on an imputation or presumption of fault under Article 2315 of the Code, as stated in the above-quoted passage from the Lartigue case.

In Penn, supra, the Court went one step further and held that the manufacturer who assembled and marketed the gauge in question under its own name would be liable to the plaintiff for his injuries, even though the defective sight glass which exploded was manufactured by Corning Glass Company for Inferno Manufacturing Company as a component part of its final product. Again referring to the Restatement of Torts Second, Section 400, the same principle is announced, viz:

> "Selling as Own Product Chattel Made by Another —
> One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer."

It is now the settled jurisprudence of Louisiana that there is a species of strict liability in tort based upon civil law concepts of fault and not circumscribed by considerations of negligence, or personal culpability, imposed upon manufacturers. This rule, with slight theoretical differences, reaches the same result as Sections 400 and 402A of the Restatement of Torts, Second, supra.

The language of the Death on the High Seas Act conferring a right of action for pecuniary losses resulting from the death of any person "caused by wrongful act, neglect or default occurring on the high seas", 46 U.S.C.A. § 761, is broad enough to include all actions

ex delicto. It is not limited to torts based upon negligence. The death of a seaman caused by unseaworthiness is included within its ambit. *Symonette Shipyards Ltd. v. Clark*, 365 F. 2d 464, cert. den. 387 U.S. 908 (5 Cir. 1966); *Doyle v. Albatross Tanker Corp.*, 367 F. 2d 465 (2 Cir. 1966); Annotation 22 ALR 2d 852, et seq. and cases therein cited. Consequently, the Soileau beneficiaries can recover under DOHSA, and Nicklos in maritime tort, provided the principles expressed in §§ 400 and 402A of the Restatement of Torts, Second, are not inconsistent with admiralty law.

Counsel for defendant point to *Noel v. United Aircraft Corporation*, 204 F. 2d 929 (D. Del 1962), which denied application of the theory of strict liability (or implied warranty as it is often called) to a death claim under DOHSA. The court in Noel, however, did not rule out the application of this doctrine for all time. Instead, it expressly recognized that when the rule became more settled it might well be incorporated into the maritime law, saying:

> "A state rule that is 'so widely accepted as to be construed as a part of the general law of torts' may be incorporated into admiralty, provided the rule is harmonious with the rest of admiralty, Sieracki v. Seas Shipping Co., 149 F. 2d 98, 100 (3 Cir. 1945)".

This is exactly what has happened in the short period of time that has elapsed since Noel was decided. The rule has been recognized and incorporated into the Restatement, and is an offshoot of the same principles

applied in the Sieracki case by the Court of Appeals, to which the learned Judge in *Noel* made reference.

We believe the better view to be that expressed in *Middleton v. United Aircraft Corp.*, 204 F. Supp. 856 (S.D. N.Y. 1960, *Montgomery v. Goodyear Tire and Rubber Co.*, 231 F. Supp. 447 (S.D. N.Y. 1964), *Sevits v. McKiernan-Terry Corporation*, 264 F. Supp. 810 (S.D. N.Y. 1966) and *Krause, et al v. Sud-Aviation, Societe Nationale, etc. No. 6010 C.C.H. Products Liability Reports*, (S.D.N.Y. 1968). Cf. *Daws v. Movible Offshore, Inc.* 264 F. Supp. (E.D. La. 1967), and see also *Scott v. Eastern Air Lines, Inc.*, 399 F. 2d 14 (3 Cir. 1968). For reasons elaborated upon in these decisions, we hold that the Death on The High Seas Act encompasses an action for the death of an offshore workman occurring on a fixed platform in the Gulf of Mexico as a result of a defective crane manufactured by defendant and sent from its factory in a condition such as to render it unreasonably dangerous to those persons who might foreseeably be injured in person or property when put to its intended use. It so holding, we adopt and apply the principles enunciated in the Restatement of Torts, Second, §§ 400 and 402A, insofar as they apply to the manufacturer of such a product, as a uniform statement of the rule now so generally accepted in the States as to permit it to be incorporated into federal maritime law.'

Unit, therefore, would be liable to all plaintiffs for their damages under the maritime law, Death on the High Seas Act, or Article 2315 of the Louisiana Civil Code, the sole difference being in the measure of damages

for the wrongful death of Mr. Soileau to be recovered by his survivors, under the facts of this case. We express no opinion as to the Louisiana rule applying to the liability of sellers or retailers of such products; we are concerned here only with the liability of a manufacturer to a consumer or user of its defective article.

Union Oil Company of California must be dismissed from this suit. There is absolutely no evidence against this defendant in the record, upon which its liability might conceivably be predicated.

QUANTUM

Mr. Soileau was survived by his widow, Nettie Lee Fontenot, who was 27 years of age at the time of her husband's death, and by six children, Donald Ray Soileau, born October 6, 1955; James Randall Soileau, born April 3, 1957; Romona Soileau, born August 13, 1958; Cynthia Marie Soileau, born July 3, 1960; Patrick Soileau, born March 12, 1962; and Charles Soileau, born September 11, 1964. He earned approximately $800 per month. Maintaining a household and supporting and educating six children on this amount of money is difficult. At the time of his death, however, the deceased had acquired a home, an automobile, and provided a life insurance policy, which will pay $1200.00 to each child for college education. He owed his children the duty to support, maintain and educate them to age 21.

Fixing each survivor's pecuniary losses is difficult. Assuming an average cost of $75.00 per month per child, which includes medical, dental and other ordinary expenses of life, such as clothing, recreation, school needs, etc., gives us an average figure of $900.00 per child per year. There should be added to this $2200.-00 per child for higher education, in addition to the insurance proceeds mentioned above.

Mrs. Soileau received approximately $100.00 per month or $1200 per year in support from her husband. Out of his salary he expended a like amount for his expenses and pocket money. She could reasonably expect to receive this sum or its equivalent during the remaining 42 years of her husband's life expectancy. In addition, the record supports a finding that they had already begun to accumulate some property, and, as we stated at the close of the evidence, over the years should have acquired a community estate of at least $25,000.00, of which she would be entitled to one half, or $12,500.00.

We find the pecuniary losses sustained by these parties as follows:

Mrs. Nettie Lee Fontenot Soileau	$ 62,900.00
Donald Ray Soileau	12,100.00
James Randall Soileau	13,000.00
Romona Soileau	13,900.00
Cynthia Marie Soileau	14,800.00
Patrick Soileau	16,600.00
Charles Soileau	20,200.00

These amounts should be discounted at the rate of 4% per annum to arrive at value on January 17, 1966, when the loss accrued.

Nicklos sustained property damages as a result of the failure of the crane which the parties have stipulated to be in the sum of $40,104.00.

We next direct our attention to the claims of Mrs. Soileau and her children for damages allowable under Article 2315 of the Louisiana Civil Code. Under that article plaintiffs would be entitled to damages for their loss of support, and for grief, anguish and loss of love, companionship and guidance as well. Louisiana does not permit a calculation of monetary losses based upon a life expectancy discounted to present value. *Pennington v. Justiss-Mears Oil Company*, 242 La. 1, 134 So. 2d 53 (1961). However, our award for these losses would certainly not be less than the sums awarded to the widow and children under the Death on the High Seas Act, which we have calculated above. Assuming that they would not be more, if Article 2315 is a proper vehicle for recovery in this case, the amounts so awarded should be supplemented by adding thereto damages for grief, anguish and loss of love, companionship and guidance. At the conclusion of the trial the court stated orally that it would render judgment for these elements of damage, and fixed the amount at $40,000.00 for Mrs. Soileau, plus funeral expenses of $3788.65 paid by her, and $10,000.00 for each one of the six children. Under Article 2924 of the Code, legal interest is fixed at 5% per annum, and under LSA-R.S. 13:4203, interest on judgments in actions for damages

"ex delicto" shall attach from date of judicial demand. In this case suit was filed on June 6, 1966.

Counsel for Unit has filed a written objection to our rendering judgment on these claims at this time, by letter dated January 3, 1969. We believe that his position is correct, and now vacate the ruling made orally at the end of the trial. Plaintiffs' claims under Article 2315 will be held for determination pending decision of the question by the Supreme Court in *Dore* and *Rodrigue*, supra. But this should not affect our judgment on the claims under DOHSA, as to which the decree to be entered herein shall be final, as there is no just reason for delay. F.R.C.P. Rule 54(b), 28 U.S.C.A.; Moore's Federal Practice, Vol. 6, § 54.34 p. 240.

This procedure may result in additional expense to the litigants if appeals are taken. However, we feel bound by the *Dore* case, and do not wish to speculate upon the final outcome.

All damages allowed Mrs. Soileau and her six children under the Death on the High Seas Act, and damages allowed Nicklos, shall bear prejudgment interest at the rate of five per cent per annum, running from January 17, 1966, until paid. *National Air Lines v. Stiles*, 268 F. 2d 400 (5 Cir. 1959); *Geotechnical Corp. of Del. v. Pure Oil Co.*, 214 F. 2d 476 (5 Cir. 1954); *Canova v. The Travelers Insurance Co.*, 5 Cir. January 29, 1969, not yet reported.

The parties will prepare an appropriate decree for signature in keeping with the views herein expressed,

pursuant to Rule 9(e) of this Court. Previous decrees submitted are not appropriate, in view of our final conclusion as to the claims under Article 2315.*

Lafayette, Louisiana, March 28, 1969.

(Signed) R. J. PUTNAM
United States District Judge

Filed
March 28, 1969

---

*On June 9, 1969, the Supreme Court reversed the Rodrigue and Dore decisions, supra. Rodrigue v. Aetna Casualty and Surety Co., 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969). Since this case is currently on appeal, we are without jurisdiction to take further action. Sykes v. United States (8 Cir. 1968) 392 F.2d 735, 738; Bush v. United Benefit Fire Insurance Company (5 Cir. 1963) 311 F.2d 893, 894; 9 Moore's Federal Practice, § 203.11 at 734.

JUDGMENT

(Title Omitted)

No. 12,064

This action having been duly tried before the Court without jury, and the Court having considered the pleadings and evidence presented on trial, together with briefs and arguments of counsel for the parties, and having made findings of fact and conclusions of law set forth in the written Opinion handed down and filed by the Court on March 28, 1969, it is hereby:

ORDERED, ADJUDGED AND DECREED that plaintiff, Nettie Lee Fontenot Soileau, individually and as natural tutrix of her minor children, have and recover against the defendant, Unit Crane and Shovel Corporation, for pecuniary losses sustained by her and her minor children as a result of the death of Lanson Soileau, in the following sums:

Mrs. Nettie Lee Fontenot Soileau	$ 30,218.44
Donald Ray Soileau	10,084.00
James Randall Soileau	10,646.50
Romona Soileau	11,187.40
Cynthia Soileau	11,706.70
Patrick Soileau	12,686.80
Charles Soileau	14,431.00

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that third-party plaintiff, Nicklos Drilling Company, have and recover from defendant, Unit Crane and Shovel Corporation, the sum of FORTY THOUSAND ONE HUNDRED FOUR & NO/100 ($40,104.00) DOLLARS.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff's claims against defendant, Union Oil Company, be and they are hereby rejected, and that the plaintiff's claims as to this defendant are dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that defendant shall pay prejudgment interest in the amount of five per cent (5%) per annum on the award of damages hereinabove rendered running from

the date of the loss, January 17, 1966, until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the claims of plaintiff, Nettie Lee Fontenot Soileau, individually and in her representative capacity, for damages pursuant to the Louisiana Wrongful Death Statute, LSA-Revised Civil Code, Article 2315, are hereby reserved pending the outcome of the Supreme Court decision in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 F. 2d 616 (5 Cir. 1968), and *Dore v. The Link Belt Company*, 391 F. 2d 671 (5 Cir. 1968), *writs issued*, ____ U.S. ____, 89 S. Ct. 295, 21 L. Ed. 2d 268 (1968).

Lafayette, Louisiana, this 1st day of May, 1969.

/s/ R. J. Putnam
United States District Judge

Filed
May 1, 1969

APPENDIX "B"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28331

NETTIE LEE FONTENOT, ET AL.,
Plaintiffs-Appellees-Cross Appellants,

versus

NICKLOS DRILLING COMPANY, ET AL.,
Defendants-Appellees,
UNIT CRANE AND SHOVEL CORPORATION,
Defendant-Appellant-Cross-Appellee.

Appeal from the United States District Court for the Western District of Louisiana

(July 21, 1970)

Before COLEMAN, GOLDBERG and MORGAN, Circuit Judges.

PER CURIAM: This case involves claims arising out of an accident on a stationary drilling platform off the coast of Louisiana. At the time of the trial this circuit followed the rule that the Death on the

High Seas Act, 46 U.S.C.A. §§ 761 et seq., governed all claims arising out of an accident on one of these platforms. *Rodrique v. Aetna Casualty and Surety Co.*, 5 Cir. 1968, 395 F.2d 217; *Dore v. Link Belt Co.*, 5 Cir. 1968, 391 F.2d 671. The trial court carefully followed this rule and permitted recovery under the terms of the Death on the High Seas Act.

After the trial and before this appeal, the United States Supreme Court rendered its opinion in *Rodrique v. Aetna Casualty and Surety Co.*, 1969, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360, reversing this circuit and holding that the Outer Continental Shelf Lands Act, 43 U.S.C.A. §§ 1331 et seq., governs all claims arising out of accidents of this sort on such offshore platforms. Under that Act federal law supplemented by the law of the adjacent state is applicable to such claims. It appears, therefore, that Louisiana law as provided in the Outer Continental Shelf Lands Act rather than the law provided in the Death on the High Seas Act should have been applied to the claims asserted in this case. Accordingly, we reverse the decision of the trial court and remand for a new trial to be conducted in accordance with the Supreme Court's opinion in *Rodrique*.

REVERSED and REMANDED.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

August 12, 1970

TO ALL PARTIES LISTED BELOW

Re: No. 28331 - Fontenot, et al vs. Nicklos Drilling Co.

Gentleman:

You are hereby advised that the Court has today entered an order denying the Petition ( ) for Rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk
(Signed) PAT QUARTARARO
Deputy Clerk

/paq

cc: Mr. Borie F. Navratil
Mr. Jacque B. Pucheu
Mr. J. Winston Ardoin
Mr. Sam A. LeBlanc, III

"EXHIBIT A — COURT OF APPEAL"

APPENDIX "C"

U.S.C.A. Title 43, Section 1333

"(a) Constitution and United States laws; laws of adjacent States; publication of projected State lines; restriction on State taxation and jurisdiction.

"(1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however,* That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

"(2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State as of the effective date of this subchapter are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Fed-

eral Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

"(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom."

APPENDIX "D"

U.S.C.A. Title 28, Section 2106

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

SUPREME COURT, U. S.
FILED
FEB 8 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

~~795~~

No. 796

NETTIE LEE FONTENOT, ET AL
NICKLOS DRILLING COMPANY,

Applicants

Versus

UNIT CRANE AND SHOVEL CORPORATION,

Respondent

RESPONSE OF UNIT CRANE AND SHOVEL CORPORATION TO THE PETITION FOR A WRIT OF CERTIORARI FILED BY NETTIE LEE FONTENOT, ET AL AND NICKLOS DRILLING COMPANY

BORIS F. NAVRATIL, of
BREAZEALE, SACHSE & WILSON
701 Fidelity National Bank Building
Baton Rouge, Louisiana 70801

Counsel for Respondent, Unit Crane
and Shovel Corporation

ORTLIEB PRESS BATON ROUGE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No.

NETTIE LEE FONTENOT, ET AL
NICKLOS DRILLING COMPANY,
Applicants

Versus

UNIT CRANE AND SHOVEL CORPORATION,
Respondent

RESPONSE OF UNIT CRANE AND SHOVEL CORPORATION TO THE PETITION FOR A WRIT OF CERTIORARI FILED BY NETTIE LEE FONTENOT, ET AL AND NICKLOS DRILLING COMPANY

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

We agree with the applicants that the writs they seek should be granted so that the question could authoritatively be settled whether the *Rodrigue*[1] decision should be applied retroactively or prospectively only. Uncertainty concerning this has already led to two conflicting decisions and others are bound to follow.

Rodrigue v. Aetna Casualty & Surety Company, 1969, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360.

In *Guillory v. Humble Oil & Refining Co.*, 310 F. Supp. 330 (E.D. La. 1970), a Louisiana District Court, without discussion of the problem, applied *Rodrigue* retroactively and held that plaintiff's suit was barred by the one-year prescriptive period established by Louisiana Civil Code Article 3536. The suit was filed on January 15, 1968, a little over two years after the cause of action arose. Under the then existing law, it was filed timely. Indeed, *Rodrigue*, which did not come until a year and one-half later (June 6, 1969), was not even a gleam in Your Honors' eyes at that time. Still, there was no doubt in the district judge's mind that by ruling out the applicability of maritime law, *Rodrigue* also ruled out the maritime doctrine of laches. Granted that the rules governing limitations of actions are procedural and that even under *Rodrigue* the Court was free to apply a federal procedural law governing prescription. There is no such generally applicable federal law—the Court concluded—therefore, the prescriptive provisions would have to come from the same source as the cause of action itself, namely, state law.

In opposition to *Guillory*, the Fifth Circuit Court of Appeals recently held that the maritime doctrine of laches would be applied in a fixed platform injury suit arising and tried prior to *Rodrigue*. *Huson v. Otis Engineering Corporation*, 430 F.2d 27. But the Court did not reach this result on the basis that *Rodrigue* was non-retroactive, otherwise it would have simply said that the action was commenced timely under *Snipes*. No—the Court went to great pains to explain why laches should apply despite *Rodrigue*. This can lead to no other conclusion than that, despite all protestations to the contrary, the Court was in effect applying *Rodrigue* retroactively. It reasoned that *Rodrigue* commands only the adoption of state substantive law and not such procedural law as Article 3536 of the Louisiana Civil Code which establishes a

---

Pure Oil Company v. Snipes, (CA-5, 1971) 439 F.2d 69.

one year prescription for tort actions; that, therefore, despite *Rodrigue*, it was free to apply the law of the forum, i. e., federal law, on a procedural matter such as prescription. But what federal procedural law of prescription is there with respect to a cause of action which is not created by specific federal substantive law? Unlike Judge West in the *Guillory* case, who concluded there was no such law and that the law which generates the cause of action, i.e., state law, must also govern prescription, *Huson* reverts to federal maritime law—a result which appears quite in the teeth of *Rodrigue*. Assuming the retroactivity of *Rodrigue*, *Guillory* would appear to be the more valid of the two decisions.

(We might observe, parenthetically, that *Huson* appears to base its favoritism toward the doctrine of laches, as against state prescriptive laws, on the "strong federal surge toward uniformity." The argument of uniformity is less than overwhelming when one considers the "jack-up" platforms which are also used extensively in the Gulf. Working conditions on these platforms do not differ one iota from those on stationary platforms. However, due to the fact that they may occasionally be floated and moved by water, these platforms have been federally characterized as vessels. For a single wrongful death action arising on such a platform the "surge toward uniformity" has established no less than three distinct prescriptive periods: two years under the Death on the High Seas Act (46 USC 761-68); three years under the Jones Act (46 USC 688); and laches under the maritime law. At the same time, *Huson* recognizes that a wrongful death action arising on a fixed platform may henceforth have to be subjected to the *one year* peremption period which is the adjunct of the Louisiana Wrongful Death Statute, Civil Code Article 2315. Quo Vadis, uniformity?)

The question remains: Should *Rodrigue* be applied retroactively? From purely equitable considerations, we would have to agree with applicants that it probably should not. We recognize, however, that there are precedents for either position, equities notwithstanding. This seems apparent from the recent decision rendered by this Court in *United States v. Estate of Donnelly*, 1970, 397 U.S. 286, 90 S.Ct. 1033. The question before the Court was whether it should apply retroactively its own prior decision which changed the law respecting the mode of filing federal tax liens. Retroactivity would have burdened with a tax lien property acquired by innocent purchasers at a time when the established law permitted them to acquire it without a tax lien. The equities against retroactivity were just as strong as in *Chicot County Drainage District v. Baxter State Bank*, 1940, 308 U.S. 371, 60 S.Ct. 317, 87 L.Ed. 329. However, only three dissenters chose to follow *Chicot*, while the majority voted in favor of retroactivity. See also: Anno.: Prospective or Retrospective Operation of Overruling Decisions, 10 ALR3d 1371; and *United States v. Kelly*, 314 F. Supp. 505, (E.D. N.Y. 1970) which catalogs innumerable cases dealing with the problem and neatly separates them into two groups—pro and con—each group being of apparently equal length and weight.

Beside agreeing with applicants that a writ should issue in this case, we must also, on further reflection, agree with them that *Rodrigue* should not be applied retroactively to this case. Too much reliance has been placed by the parties and the trial judge on the pre-*Rodrigue* law and the results cannot now be undone even by a remand for a new trial. To borrow this Court's language from the *Chicot* case (supra) "the past cannot always be erased by a new judicial declaration." For instance, in relying on pre-*Rodrigue* law the trial judge in this case, long before the trial on the merits, sustained a motion by one of the original defendants, Boehck Engineering

Company, and dismissed the suit against it. Bouhck was the seller of the crane which fell and led to the death of Mr. Soileau which is the core of this litigation. The motion and ruling were based on the ground that the only cause of action asserted against Bouhck was under provisions of the Louisiana Civil Code which makes sellers responsible for latent defects in the merchandise they sell. The Judge correctly held that plaintiffs could not avail themselves of Louisiana law since the cause of action arose in a locality subject to maritime law. There is simply no way to undo that ruling now. At the same time, is it valid to speculate that if Bouhck had remained in the suit, it may have been dismissed after a trial on the merits anyway? If it decided to impose liability, may not a jury have conceivably found Bouhck responsible or at least jointly responsible with Unit which would have lessened the burden of the judgment imposed on Unit?

Further relying on pre-*Rodrigue* law, the trial judge, on his own motion, during a pre-trial conference held approximately three weeks prior to trial on the merits, (and about two weeks before this Honorable Court granted writs in *Rodrigue*) struck Mrs. Fontenot's demand for a jury trial. He did so on the then correct conclusion that plaintiff's only cause of action against Unit Crane and Shovel Corporation was under the provisions of the Death on the High Seas Act. Since the ruling was patently correct on the basis of established law, Unit Crane and Shovel Corporation did not take issue with it and thus lost the right to have the case tried by a jury to which it is presumably entitled under the *Rodrigue* holding. The loss of a jury trial could, of course, be remedied by a remand for a new trial. This is the only way, however, it could be remedied. We totally disagree with applicants in their argument that even if this Court should hold that *Rodrigue* is to be applied retroactively to this case, a re-trial is unnecessary because the trial judge has already considered all con-

ceivably applicable laws while trying the case and made his findings with reference thereto. This facile argument assumes that the jury would, of necessity, be compelled to make the same findings. A glance at the complex factual issues inherent in the evidence adduced in the trial of this case makes such an assumption patently untenable.

Frankly, we have never heard of a case in which the trial judge reserved plaintiff's rights to proceed not only on the basis of existing laws (which the judge is sworn to administer) but on the basis of some future law, which the judge thinks ought to, but which may or may not, come to pass. (After all, this Court in *Rodrigue* could conceivably have affirmed the *Snipes* line of jurisprudence which had been followed in the Fifth Circuit for some ten years; as it recently upheld another creature of the Fifth Circuit—the doctrine of operational negligence). We submit that such practice should be viewed with disfavor and strongly discouraged.

Finally, while wearing the established-law hat (as against the speculative-law hat), the trial judge agreed that the general maritime law which applied to plaintiffs' causes of action (it applied to the death claim through DOHSA) did not contain any doctrines of strict liability with respect to product failures, such as are found in the laws of many states. To remedy this situation, the judge adopted as new substantive maritime law Sections 400 and 402(a) of the *Restatement of the Law of Torts* and predicated Unit's liability to plaintiffs on this newly-minted substantive maritime law. To our argument, that a re-trial is necessary if retroactivity is ordained, we add the proposal that the *Restatement* does not correctly reflect the Louisiana law respecting manufacturers' liability and that a jury instructed pursuant to applicable Louisiana law may well make different findings from those made by the trial judge on the basis of the *Restatement*.

In the alternative that this Court should hold that the *Rodrigue* decision is not to be applied retroactively, the following additional questions present themselves for review: Is there any substantive maritime law of strict products liability such as that set forth in Sections 400 and 402(a) of the *Restatement of the Law of Torts*? If there is no such law at present, may it—deus-ex-machina-fashion—be established by a federal district Judge sitting in admiralty? If it may be, should it be? In brief, the case poses for resolution the problem so skillfully outlined by Judge Layton in *Noel v. United Aircraft Corporation*, 204 F. Supp. 929 (1962):

> "* * * * Thus, in spite of the fact that they cannot advance some of the strongest reasons for expansion of implied warranty liability, Libellants are asking this Court to extend it into areas not yet reached by the highest Court of any state.
>
> "Finally, introduction of implied warranty of fitness into admiralty would not harmonize with existing admiralty policy. Confusion would be created as to the relationship of implied warranty of fitness to the existing admiralty doctrine of unseaworthiness. If unseaworthiness and implied warranty of fitness are the same, the Court has already explained why Supreme Court limitations on the scope of unseaworthiness bar extension of either doctrine in admiralty to embrace manufacturers and passengers. However, if implied warranty of fitness is deemed to be different from unseaworthiness, its introduction into admiralty should be accompanied by careful definition of its boundaries, to avoid confusion with unseaworthiness. The Court has tried and failed to find any meaningful distinctions between the two doctrines. There is no substantial difference between the implied warranty that a propeller is fit and the implied warranty that a propellor is seaworthy (or airworthy). The only important

difference lies in the classes of persons owing the duty, and the class of persons protected. If the doctrine of unseaworthiness is to be expanded by calling it 'implied warranty of fitness,' that expansion should be made by Congress or the Supreme Court, not here.

"The Court concludes that implied warranty of fitness should not be incorporated into the general maritime law at this time."

In this connection it may also be well to recall that the occurrence of a tort on navigable waters is but one of the bases for admiralty jurisdiction:

"The basis for admiralty jurisdiction must be a combination of a maritime wrong and a maritime location. In addition to the requirement of locality, there is a continuing undercurrent which requires that the controversy have a maritime nexus. The tort must arise from a maritime transaction, or be of a maritime nature, or deal with a maritime subject."
McGuire v. City of New York, (S.D. N.Y. 1961) 192 F. Supp. 866.

See also: *Atlantic Transport Company v. Kimbrovek*, 1914, 234 U.S. 52, 34 S.Ct. 733, 58 L.Ed. 1208.

Succinctly stated, admiralty does not and should not concern itself with non-maritime affairs. That conclusion has been recognized and underscored by this Court in the *Rodrigue* decision itself, when it refused to expand admiralty jurisdiction over the offshore stationary drilling platforms, because they are essentially non-maritime. Should not the same restraint be applied by an admiralty court when it comes to the determination of a land-based manufacturer's liability for products which may, at best, have only casual connection with the water?

In the ultimate alternative that this Court should decree that this case remain under pre-Rodrigue law and should further endorse the amplification of existing substantive maritime law by Sections 400 and 402(a) of the Restatement, we believe that the decision holding Unit Crane liable to plaintiffs is based on erroneous conclusions of fact. These conclusions were not examined by the Court of Appeals in view of its decision to remand the case for a new trial. In an admiralty proceeding, Unit was entitled to have them examined as fully as if the case had been tried, de novo, before the appellate tribunal. *New Orleans Stevedoring Co. v. North Atlantic & Gulf SS Co.*, (CA-5, 1954) 213 F.2d 859.

In view of the above, we believe that a writ of certiorari should issue herein; that the decision of this Court in *Rodrigue v. Aetna Casualty & Surety Company*, 395 U.S. 352 should be declared to have prospective operation only; that the decision of the trial court should be reversed on the law (there being no maritime law of manufacturer's strict liability for product failures and Unit having been found free of negligence); alternatively, the decision of the trial could should be reversed on the facts which show that the crane in question was adequate and fell due to a gross overload, not any inherent defects; alternatively, the decision of the Fifth Circuit Court of Appeals should be affirmed.

BORIS F. NAVRATIL, of
BREAZEALE, SACHSE & WILSON
701 Fidelity National Bank Building
Baton Rouge, Louisiana 70801
Attorneys for Respondent, Unit
Crane and Shovel Corporation

CERTIFICATE

In observance of the Rules, I have served three copies of the above and foregoing response on behalf of Unit Crane and Shovel Corporation upon all parties, by prepaid mail addressed to their counsel, this 5th day of February, 1971.

BORIS F. NAVRATIL